Through Videoconference

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT No. I
*** *** ***

M.A. No. 3691 of 2019
in
C.P. (IB) No. 2298/MB/2018

Santanu T. Ray,
Resolution Professional of Shree Vaishnav Casting Pvt. Ltd.
having his office at AAA Insolvency Professionals LLP,
A-301, BSEL Tech Park,
Sector 30A, Opposite Vashi Railway Station,
Vashi, Navi Mumbai – 400 705. … **Applicant**

V/s

1. Maharashtra Industrial Development Corporation Limited,
   Regional Office, Udyog Bhavan,
   Satpur, Nashik – 422 007.
2. Asset Reconstruction Company (India) Limited
   Having Office at 10th Floor, 29, Senapati Bapat Marg,
   Dadar (West), Mumbai – 400028. … **Respondents**

In the matter of:

Kay Bee Foundry Services Private Limited … Operational Creditor

versus

Shree Vaishnav Casting Private Limited … Corporate Debtor

Order Dated: 12.04.2021

CORAM:

Janab Mohammed Ajmal, Hon'ble Member (Judicial)

Shri V. Nallasenapathy, Hon'ble Member (Technical)

Appearance:

For the Applicant:	Mr. Rohit Gupta with Ms. Rubina Khan, Advocates i/b Fortis India Law.
For Respondent No. 1:	Mr. Chetan Kapadia with Mr. Rahul Sarda and Ms. Khushbu Marwadi, Advocates i/b Jay & Co
For Respondent No. 2:	Mr. Nikhil Rajani, Advocate i/b M/s. V. Deshpande and Co.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. This is an Application under section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (the Code) by the Resolution Professional seeking the following reliefs:

    a. *To quash and set aside the notice dated 8.11.2019 issued by the Respondent as null and void and to restrain the Respondent from taking any steps in further of the said notice dated 8.11.2019;*

    b. *To direct the Respondent to restrain from terminating the lease agreement dated 21.1.2015 till the completion of the corporate insolvency resolution process or to take any further step in this respect;*

    c. *To direct the Respondent to extend their co-operation in concluding the corporate insolvency resolution process in terms of the Insolvency and Bankruptcy Code, 2016;*

d. Till the disposal of this MA, to pass an order directing and injuncting the Respondent from taking possession of the said leasehold land till such time this MA is disposed of;

e. *For interim and ad interim orders in terms of prayers (1) to (3) above".*

2. The Counsel for the Applicant submits that:

a. Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor was initiated by order dated 11.03.2019 of this Tribunal on a petition filed by an Operational Creditor. The Applicant herein was confirmed as Resolution Professional (RP) by order dated 10.05.2019 of this Tribunal.

b. The resolution process is under progress. A Resolution Plan approved by the Committee of Creditors (CoC) is pending for approval in MA No. 3960 of 2019 before this Bench.

c. The Corporate Debtor had taken an industrial property *viz.* B-11 from Respondent No. 1 (R1) in the Dindori Industrial Area, on lease for 95 years from 21.01.2015.

d. A copy of the lease agreement registered as document No. 253/2015 dated 21.01.2015 on the file of Sub Registrar, Dindori, Nashik is annexed to the application as Annexure VII.

e. Building plan was approved by R1, *vide* letter No. EE/DB/DNR/B-34521/2015 dated 06.05.2015 is also annexed to the application as Annexure VIII.

f. The Corporate Debtor availed Financial facilities aggregating to Rs.7,22,80,214/- from Dewan Housing Finance Corporation Limited (DHFCL) against the security of the said leasehold land and the unit

constructed / to be constructed thereon. R1 accorded consent *vide* letter No. MIDC/RO(NSK)/DIN/LMS-52/3141 dated 12.05.2015 for creating the mortgage in favour of DHFCL.

g. A Tripartite Agreement dated 26.05.2015 was executed between R1, the Corporate Debtor and DHFCL on certain terms and conditions subject to which the mortgage was permitted by R1 to be created on the leasehold land. A copy of the agreement is annexed at Annexure X.

h. DHFCL assigned the debt of the Corporate Debtor together with security interest over the leasehold land to Respondent No. 2 (R2) who is the Trustee of ARCIL-Retail Loan Portfolio-047-Trust under Section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), *vide* registered Assignment Agreement dated 20.01.2018. The said agreement is annexed as Annexure XI.

i. On 29.01.2019, R1 issued a show cause notice to R2 as to why action should not be initiated and allotment of the plot be not cancelled, since the conditions of lease requiring building to be constructed by 19.01.2017 had been violated.

j. R2 filed Writ Petition No. 2470 of 2019 on the file of Hon'ble Bombay High Court against R1 challenging the show cause notice. The Writ Petition was dismissed by order dated 04.11.2019 with the observation that R1 had the right to issue a show cause notice to ARCIL and the same could not be faulted.

k. In the meantime, the CIRP intervened on 11.03.2019. On 08.11.2019, the R1 issued a notice to the Applicant stating that the lease agreement

was terminated and an officer of the R1 would come on 14.11.2019 to take possession of demised land.

l. The Counsel for the Applicant submits that while the CIRP is going on, the moratorium provided under Section 14 would be effective. The R1 is prohibited under Section 14(1) of the Code from recovering or taking over possession of the property in occupation or possession of the Corporate Debtor. The notice dated 08.11.2019 is invalid and illegal. Thus, deserves to be set aside.

m. On the strength of the *non obstante* clause provided in Section 238 of the Code, it is submitted that the Code has an overriding effect on any other law for the time being in force. The MIDC Act being inconsistent with the provisions of the Code would not have precedence.

n. The value of leasehold land is substantial and thus huge value has been attributed to it by the Successful Resolution Applicant in the Resolution Plan, pending approval before this Bench.

o. If R1 is permitted to terminate the lease agreement and take back the possession of the leasehold land, the entire resolution process will become unstable and chaotic thereby rendering the entire CIRP futile and unsuccessful. That would defeat the very purpose and objectives of the Code and thus under no circumstances be permitted in law.

3. The Learned Counsel for the Applicant has drawn our attention to the provisions of Section 14 of the Code which provides as below:

*"**14. Moratorium -***

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order

(2) declare moratorium for prohibiting all of the following, namely:
(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
(b) ... ...
(c) ... ...
(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor ... ..."

4. Relying on the Judgment in *Rajendra K. Bhutta vs. Maharashtra Housing and* Area *Development Authority & Another: 2020 (4) CTC 692*, it is submitted that R1 cannot take possession during the period of CIRP. In this case the lease agreement was terminated during the CIRP. Hence the *ratio* laid down in the case is squarely applicable to the facts of this case.

5. The Counsel for the Applicant, referring to the contention of R1 submitted that R1 re-possessed the land, when the possession was with R2. Despite the possession with R2, the Corporate Debtor continued to hold leasehold rights, ownership and title of the land and they never got vested with R2.

6. The Counsel for the R1 submitted as below:
   a. R1 is a Government of Maharashtra Undertaking, established with the object of ensuring planned and accelerated industrial development in the State under the provisions of MIDC Act.
   b. The land was allotted to the Corporate Debtor by the Land Allotment Committee as per Maharashtra Industrial Development Corporation

Disposal of Land Regulations, 1975 which regulates the procedures for disposal of plots in the industrial areas and estates.

c. Clause 2(d) of the Lease Deed dated 12.05.2015 provided that the Corporate Debtor had to complete construction of at least 8,224 sq. mtrs of building and other structures on or before 19.01.2017.

d. Since the Corporate Debtor violated the clause 2(d) referred above, R1 issued show cause notice to the Corporate Debtor on 01.11.2018, calling upon as to why action of termination of lease deed and repossessing the subject plot should not be taken. On 29.01.2019, R1 issued notice to DHFCL and R2 on the same subject.

e. R2 challenged the notice in the Writ Petition before the Bombay High Court and the Writ Petition was dismissed.

f. Now the leasehold rights of the land are with R2 in view of the assignment by DHFCL in favour of R2. As the leasehold right of the subject plot was transferred to R2 on 20.01.2018, the question of moratorium being applied to the subject plot does not arise. This position was also fortified by the order of the Hon'ble Bombay High Court dated 04.11.2019 passed in the referred Writ Petition.

g. This Application is not maintainable. The decision to terminate the lease and/or repossessing the plot is a decision which falls outside the purview of the Code and is in the public law domain and the decision can only be called in question in a court vested with power of judicial review over administrative action. This Tribunal not being a Civil Court and being one under special statue to discharge specific functions does not have the power of judicial review over administrative action. To buttress this point, R1 relied on the judgement of Hon'ble Supreme Court in the case of *Embassy*

Property Developments Pvt. Ltd. v. *State of Karnataka & Ors.* reported in [2020] 157 SCL 445 (SC) wherein it was held as below:

> *"26. The MMDR Act, 1957 is a Parliamentary enactment traceable to Entry 54 of the Union List in Seventh Schedule of the Constitution. The object of the Act as it stood originally was the Regulation of mines and development of minerals. After the Amendment Act 38 of 1999, the object of the Act is to provide for the development and Regulation of mines and minerals. Section 2 of the Act declares that it is expedient in public interest that the Union should take under its control, the Regulation of mines and the development of minerals. Section 4(1) of the Act prohibits the undertaking of mining operations (and reconnaissance and prospecting operations), in any area, except under and in accordance with the terms and conditions of a mining lease granted under the Act and the Rules made thereunder. After the insertion of Sub-section (1A) in Section 4, by the Amendment Act 38 of 1999, even transportation or storage of any mineral otherwise than in accordance with the provisions of the Act and the Rules made thereunder is prohibited. The Act also imposes restrictions on the grant of mining leases. Section 8A of the Act, inserted by the Amendment Act 10 of 2015 provides for deemed grant and deemed extension of different kinds. Primarily Section 8A applies only to minerals other than those specified in Parts A and B of the First Schedule. In so far as minor minerals are concerned, the State government is empowered to make Rules for regulating the grant of mining leases.*
>
> *...*
>
> *27. ... The liberties and privileges granted to the Corporate Debtor by the Government of Karnataka under the mining lease, are delineated in Part IV of the mining lease. The mining lease was issued in accordance with the statutory Rules namely Mineral Concession Rules, 1960. Therefore the relationship between the Corporate Debtor and the Government of Karnataka under the*

mining lease is not just contractual but also statutorily governed.

...

28. Therefore as rightly contended by the learned Attorney General, the decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action.

...

29. The NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. Hence, let us now see the jurisdiction and powers conferred upon NCLT.

...

37. ... The only provision which can probably throw light on this question would be Sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of

IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal Under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results.

...

40. If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18.

...

This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).

41. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right."

h. The correctness or otherwise of R1's action in terminating the lease agreement and/or repossessing Plot No. B-11 from R2 is not questionable.

i. The Corporate Debtor have been granted license only to enter upon the plot for the purpose of building and executing works and until grant of lease, the Corporate Debtor would be deemed to be a mere licensee.

j. If the Corporate Debtor failed to build and complete construction within specified time in terms of the Lease Deed, R1 shall have power to resume the possession of the plot and the agreement shall cease and terminate. The Development Control Regulation prescribed by R1 will be applicable. The Corporate Debtor failed to comply with the covenants and stipulations regarding construction within the prescribed time limit under the allotment order. Thus, a Show Cause Notice was issued to the Corporate Debtor (lessee) on 01/11/2018, which is prior to the commencement of CIRP. To which no reply was filed by the Corporate Debtor.

k. The Lease Agreement stood terminated and the lease stood determined as per clause 4(b) thereof. It is submitted that the termination is valid. In support of such proposition, R1 relied upon the judgement dated 30th November 2018 passed by the Hon'ble NCLAT in the case of *Monnet Ispat & Energy Ltd.* v. *Government of India, Ministry of Coal* [Company Appeal (AT) (Insolvency) No. 26 of 2018] wherein it was held that:

> *"3. After initiation of the 'Corporate Insolvency Resolution Process', the Government of India, issued notice dated 30th December, 2017 for termination of 'Coal Mines Development and Production Agreement' dated 2nd March, 2015 and vesting order 104/18/2015/NA dated 23rd March, 2015.*
> *4. The 'Resolution Professional' of 'Monnet Ispat & Energy Ltd.' challenged the letter of termination dated 30th December, 2017*

issued by the Government of India, Ministry of Coal, on the ground that it is against the provisions of Section 14 of the 'I&B Code'. ...

...

6. The Adjudicating Authority, Mumbai Bench, Mumbai, by impugned order dated 16th January, 2018, considered as to whether or not the termination order dated 30th December, 2017, is hit by Section 14 of the 'I&B Code' and on hearing the parties held that the said letter is not violative of Section 14(1)(d) of the 'I&B Code'. The Adjudicating Authority has also noticed that the Government of India is incurring an estimated loss of revenue of Rs. 314.3 Crores to the State Exchequer annually, which was the reason for the Central Government to terminate the 'Coal Mines Development and Production Agreement'.

...

8. The conditions for vesting has been shown in Clause 3 which is subject to compliance of all the eligibility conditions, payment of upfront amount in installments and furnishing of performance security etc. Completion of vesting condition and notice has been shown therein.

...

13. In the present case, as we find that the vesting of the Coal Mines is not complete in absence of any agreement with the State Government in respect to the mines in question, we hold that the 'Resolution Professional' on behalf of the 'Corporate Debtor' cannot claim that pursuant to lease the mines are under occupation or in possession of the 'Corporate Debtor'.

14. The Government of India by its letter dated 13th April, 2017 issued show cause notice to the 'Corporate Debtor' before issuance of the termination letter dated 30th December, 2017 i.e. much prior to initiation of the 'Corporate Insolvency Resolution Process' (18th July, 2017). The 'Corporate Debtor' having failed to act in terms with the said show cause. If the order of cancellation have been passed by the Government of India on

30th December, 2017, it cannot be held to be in violation of Section 14(1)(d) of the 'I&B Code'.
15. In view of the aforesaid findings, no interference is called for against the impugned order dated 16th January, 2018. The appeal is dismissed. Interim order passed by this Appellate Tribunal on 8th February, 2018 is vacated. It will be open to the Respondent-'Government of India' to accept any bid and to create third party interest with regard to mines in question which were earlier allotted vide 'Coal Mines Development and Production Agreement' dated 2nd March, 2015 to the 'Corporate Debtor'. ..."

l. The plot was conditionally leased to the Corporate Debtor. Upon breach of the conditions, the Corporate Debtor stood divested of the plot. The corporate debtor did not have any subsisting interest in the plot which could have been implicated in the Resolution Plan. To support this proposition, R1 relied on the judgement of Hon'ble Supreme Court in the case of *Municipal Corporation of Greater Mumbai* v. *Abhilash Lal & Ors.* reported in [2020] 157 SCL 477 (SC). The relevant portion of the judgement is reproduced below:

"33. The show cause notice in this case preceded admission of the insolvency resolution process. In view of the clear conditions stipulated in the contract, MCGM reserved all its rights and its properties could not have therefore, in any manner, been affected by the resolution plan. Equally in the opinion of this Court, the adjudicating authority could not have approved the plan which implicates the assets of MCGM especially when Seven Hills had not fulfilled its obligations under the contract.

...

35. Section 92 unequivocally prescribes the method whereby MCGM's properties can be dealt with through lease or by way of creation of any other interest. The only mode permitted is through

prior permission of the corporation. It is a matter of record that in the present case, the resolution plan was never approved by the corporation and that it was put to vote. The contesting parties, including the RP and CoC were unable to point out to anything on the record to establish that a valid permission contemplated by Section 92 was ever obtained with regard to the proposal in the resolution plan. The proposal was approved by the NCLT and MCGM's appeal was rejected by NCLAT. The proposal could be approved only to the extent it did not result in encumbering the land belonging to MCGM.

36. ... SevenHills did not complete construction of the 1600 bed hospital. Apparently, it did not even fulfil its commitment, or pay annual lease rentals. In these circumstances, MCGM was constrained to issue a show cause notice before the insolvency resolution process began, and before the moratorium was declared by NCLT on 13th March, 2018. According to MCGM, in terms of Clause 26 (of the contract), even the agreement stood terminated due to default by SevenHills. This Court does not propose to comment on that issue, as that is contentious and no finding has been recorded by either the adjudicating authority or the NCLAT.

...

47. In the opinion of this Court, Section 238 cannot be read as overriding the MCGM's right - indeed its public duty-to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92A of the MMC Act. This Court is of opinion that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like the MCGM is involved. Therefore, in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands. No doubt, the resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation

of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question which undeniably are public properties. The resolution plan therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM).”

m. The tripartite agreement dated 26/05/2015 provides that if the Corporate Debtor committed breach of any of the covenants therein, MIDC would give DHFCL, notice of 6 months, within which time the breach could be remedied by the Corporate Debtor or DHFCL and failure to remedy the breach would entitle MIDC to re-enter upon and resume possession of the plot.

n. DHFCL, on 01.03.2017 took physical possession of the plot from the Corporate Debtor under the provisions of SARFAESI Act.

o. Without the R1’s consent, DHFCL assigned its right of recovery of the credit facilities advanced to the Corporate Debtor to ARCIL, along with its security *vide* assignment agreement dated 20/01/2018. The possession of plot was transferred to ARCIL by DHFCL, w.e.f. 20th January 2018. Since then the possession of Plot was with ARCIL and not with the Corporate Debtor.

p. On 01/11/2018, Show Cause Notice was issued by R1 (MIDC) to the Corporate Debtor cancelling the allotment and seeking possession.

q. The Hon’ble Bombay High Court by order dated 14/11/2019 in the Writ Petition filed by R2 held that:

"Upon default by the Corporate Debtor in adhering to the terms of the lease / allotment, MIDC was entitled to revoke the lease / allotment".

r. On 08/11/2019 when R1 informed about the physical possession to be taken, the Applicant by reply dated 11/11/2019 wrongly contended that the plot was in his possession.

s. In fact, in the meetings of the CoC held on 17/06/2019 and 26/07/2019, the Applicant admitted that the custody of the leased premises had not been taken by him.

t. The Applicant has not brought any material on record to show that the possession of the land was with the Corporate Debtor on the date of initiation of CIRP i.e., on 11/03/2019.

u. Even as per Regulation 17 of MIDC Disposal of Land Regulations, 1975, R1 is entitled to resume possession of the plot due to the contravention by the Corporate Debtor of the terms and conditions of the lease. Panchnama dated 14th November 2019 was prepared by R1 at the time of taking possession of Plot B-11.

v. Since on the date of initiation of CIRP, Plot B-11 was not in possession of the Corporate Debtor, the protection under Section 14 is not available. The protection is available only in respect of property which *"is occupied by or in the possession of the corporate debtor".* The provisions of section 14(1)(d) do not have any impact on taking over possession from a third party. Furthermore, as stated above, the lease stood determined. The right of revoking the lease upon breach of conditions was recognised by the Hon'ble Bombay High Court in its Order dated 4th November 2019.

w. The ratio laid down in para 16 of the judgement dated 19th February 2020 passed by the Supreme Court in the case of *Rajendra K. Bhutta (*supra*)* is not applicable to the facts of the present case. In this judgement, the Supreme Court distinguished its judgement in the case of *Municipal Corporation of Greater Mumbai* v. *Abhilash Lal & Ors.* (*supra*) on the ground that a show-cause notice preceded the admission of the insolvency resolution process which made it clear that the assets of MCGM could not be subsumed within a resolution plan without MCGM's approval. In that case, on a reading of para 1(vii) of the judgement, it is clear that the termination was made and possession was sought to be taken after the declaration of the moratorium. The relevant portions of the judgement in the case of *Rajendra K. Bhutta* (*supra*) are as follows:

> *"17. My learned brother S. Ravindra Bhat, J.'s judgment in Municipal Corporation of Greater Mumbai (supra), which has been strongly relied upon by Mr. Dave and Mr. Patil, dealt with an entirely different fact situation, as is clear from paragraphs 32 and 33 of the said judgment, which are set out herein below:*
>
> > *32. A cumulative reading of the stipulations reveals that the contract/agreement contemplates that the lease deed was to be executed after the completion of the project. The contract reveals that (a) the project period was for 60 months starting from the date excluding the monsoon period; (b) by Clauses 5 and 17, SevenHills could mortgage the property for securing advances from financial institutions for the construction of the project and thereafter towards its working. Such mortgage/charge or interest was subject to approval by MCGM. In the event the contract was to be terminated, it was agreed that MCGM would not in any manner be*

liable towards the mortgaged amount and all its rights and ownership would continue to vest in it free from encumbrances (Clause 17).

33. The show cause notice in this case preceded admission of the insolvency resolution process. In view of the clear conditions stipulated in the contract, MCGM reserved all its rights and its properties could not have therefore, in any manner, been affected by the resolution plan. Equally in the opinion of this Court, the adjudicating authority could not have approved the plan which implicates the assets of MCGM especially when SevenHills had not fulfilled its obligations under the contract.

18. The matter had come to this Court after the Adjudicating Authority had approved of a certain resolution plan, unlike in the facts of the present case, and what was clear, on the facts of that case, was that a show cause notice of the Municipal Corporation, which preceded admission of the insolvency resolution process, made it clear that assets of MCGM could not possibly be subsumed within a resolution plan without its approval/permission. It was in this context that this Court, in para 47 of the said judgment, stated that Section 238 of the Code cannot be read as overriding the MCGM's right-indeed its public duty-to control and regulate how its properties are to be dealt with. "Properties" was referred to in this judgment as referring to assets of the corporate debtor. We have seen how, in the facts of this case, we are not concerned with the assets of the corporate debtor, least of all the assets of MHADA. The limited question before us is as to whether Section 14(1)(d) of the Code will apply to statutorily freeze 'occupation' that may have been handed over under a Joint Development Agreement."

x. The Hon'ble Supreme Court in Para 8 of the judgement in *Rajendra K. Bhutta* (*supra*), have clearly stated that for section 14(1)(d) to apply, the property should either be occupied by or be in possession of the corporate debtor, which is not the case in the facts before this Tribunal.

y. Therefore, it is submitted that this Application is not maintainable. The Respondent has correctly taken steps to resume the possession of the plot.

z. Even as per Explanation to section 14(1)(d) of the Code (introduced w.e.f. 28th December 2019 i.e., after the termination and resumption of possession) makes the intention of the legislature very clear in this regard. It clarifies that during moratorium period, a license, permit, registration, quota, concession, clearance or a similar grant or right granted *inter alia* by a statutory authority such as MIDC shall not be suspended or terminated on the grounds of insolvency, "*subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period*". In the present case, Plot B-11 was allotted at a concessional rate and the condition that the Corporate Debtor was under an obligation to comply with the construction of factory within the stipulated time (time being of essence). Since the Corporate Debtor has failed to comply with the same, protection under section 14(1)(d) of the Code is not available.

Submissions of the Successful Resolution Applicant (SRA):

7. The SRA, namely C.M. Shah Consortium is not a party to the present Application. The Counsel for the SRA submitted that it is an interested party

in view of the pendency of its Resolution Plan for approval which has already been approved by the CoC with 96.96% of voting. Thus, the SRA was permitted to make its submissions. Mr Ashish Kamat Advocate, appeared for the SRA and submitted as follows:

a. The SRA is engaged in the same line of production as the Corporate Debtor. The Corporate Debtor is having leasehold interest in the property and the possession sought for by R1 is during the CIRP period.

b. Show Cause Notices dated 01.11.2018 and 29.01.2019 were issued during pre-CIRP period i.e. before 11.03.2019. The termination/ possession notice dated 08.11.2019 was issued during CIRP and the same is hit by Section 14 of the Code.

c. The Hon'ble Supreme Court have time and again and specifically in a recent judgment of *Alchemist Asset Reconstruction Company Limited v. Hotel Gaudavan Private Limited and Others (2018) 16 SCC 94,* held that once a moratorium under Section 14 of the Code comes into effect, Section 14(1)(a) expressly stops institution or continuation of pending proceedings against corporate debtors. The Supreme Court held that:

> "*the mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect under Section 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against corporate debtors.*"

d. Reliance is also placed on the judgement of Hon'ble NCLAT in the case of *Bohar Singh Dhillon v. Rohit Sehgal (Company Appeal (AT) Insolvency No.665 of 2018 (paragraph 7)*, wherein it is held that "*till*

the period of moratorium continues, agencies such as the SEBI cannot recover any amount nor can sell the assets of the corporate debtor."

e. It relied on the judgement of Hon'ble Supreme Court in *Rajendra K Bhutta (supra)* wherein it has held that:

> "*However, when it comes to any clash between the MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14.*"

f. The termination/possession notice issued by R1 on 08.11.2019 directly addressed to the Corporate Debtor without even marking a copy to DHFCL or R2 is a clear indication that the possession of the plot is with the Corporate Debtor/Applicant.

g. Since the termination of lease and seeking possession by R1 is dated 08.11.2019, R1's claim of taking over possession of the property from R2 is untenable. On the execution of assignment by DHFCL in favour of R2, R2 took possession of the property, thereafter, upon initiation of CIRP, R2 handed over the possession of the property to the Applicant. Even if the possession/symbolic possession is with the secured creditor under the SARFAESI Act, the Debtor is not barred from repaying the debt on any date thereafter and securing its interest in the mortgaged property and re-possessing the same. It is a matter of resolution and settlement between the creditor and the debtor, whether

the creditor will accept the debtor's delayed repayment of the loan in discharge of its obligations. The Debtor always has the first right to discharge his debt and regain its security from the secured creditor.

h. As per clause 6 of the Lease Agreement, R1 may issue a show cause notice to the Lessee of his intention to terminate and if the Lessee fails to show cause, then he may terminate the agreement or may fix any extended period for the completion of the factory building.

i. Similarly, under Clause 4(a) of the Lease Agreement, except for non-payment of rent, the power of re-entry by MIDC shall be exercised only after the Chief Executive Officer has given a notice in writing, to the Lessee, stating his intention to reenter the demised land; and only if the breach is not cured within three months of such a notice. Further, Clause 4 (b) (ii) states that the Lessor may permit the Lessee to continue occupying the demised premises on payment of additional premium as may be decided upon by the Lessor.

j. Clause 2(d) of the Tripartite Agreement states that in the event there is a default/breach by the lessee and the lessor decides to re-enter the said plot area, the lessor has to give the financial institution, i.e. DHFCL, a notice in writing, of 6 months, specifying the breach committed by the lessee and the lessor shall not re-enter the said property, unless the lessee or the financial institution has failed to remedy the breach within 6 months of receipt of the said notice.

k. In spite of having issued two show cause notices and a Termination/Possession Notice, MIDC has not adjudicated upon any of the notices. No cure period is available to the financial institution under the Tripartite Agreement to remedy the alleged breach. The possession of the said property can be taken only by due process of

law after adhering to principles of natural justice, i.e., adequate notice, a fair hearing and no bias. R1 did not follow due process.

l. There was no determination of the leasehold interest of the Corporate Debtor before taking purported possession of the said property and thus the re-possession is illegal, an abuse of process of law and in flagrant violation of principles of natural justice. To the extent that it conflicts with the Code, it is void and *non-est*. As such, the MIDC's claim to possession is disputed and denied.

m. The value maximization of the assets of the Corporate Debtor and time bound revival of the Corporate Debtor are the core objects of the Code. If MIDC's purported possession of the said property is allowed to pass the muster of law, it would not only be a gross violation of the due process of law, but also contrary to and in derogation of the object of the Code. The Corporate Debtor's CIRP will be undermined and irretrievably prejudiced. MIDC's claims constitute an interference with the RP's possession, who is an officer of this Hon'ble Tribunal. Thus, the MIDC's action of purported re-possession of the said property should be declared as illegal and the said property should rightfully form a part of the pool of assets available to the Resolution Applicant for successful resolution of the Corporate Debtor.

Analysis

8. Ongoing through the pleadings and on hearing the Counsel for the Applicant, Respondents and the SRA the followings are the observations of this Bench:

a. The CIRP was initiated on 11.03.2019 and the impugned notice is dated 08.11.2019. The CIRP on the extension being granted came to an end on 06.12.2019. The R1's Show Cause Notice terminating the

lease agreement dated 22.01.2015 was issued on 08.11.2019 and the same was signed by Regional Officer, MIDC, Nashik. Para 6 and 7 of the said notice is extracted below:

> *"6. Pursuant to the provisions of the Lease Agreement, the MIDC Corporation has every right to forfeit the Premium without disturbing the right and authority of the Corporation. The License Holder hereby further intimate that if the License Holder hand over physical possession of the said plot along with Possession Receipt and Original Agreement dated 20.01.2015 on the given date and time, the Corporation shall refund back the balance premium amount after deducting 5% of the total premium amount and such other dues and outstanding, if any.*
> *7.However, if the License Holder fails to hand over possession of the said plot to the Area Manager on the given date and time and if the said License Holder failed to hand over Possession Receipt and Original Lease Agreement dated 20.01.2015 and if the Corporation compel to take possession of the said plot on the given date and time after conducting panchnama then in such case, while refunding back the Premium amount, the Corporation shall refund back the balance premium amount after deducting 10% of the total premium amount and such other dues and outstanding which please note."*

b. The above notice given by R1 unequivocally shows that the Corporate Debtor/Applicant is in the possession of leased land. In view of this, the contention of R1 that possession under SARFAESI Act was taken by DHFCL and subsequently by R2, falls to the ground. We hold that the Applicant is in possession of the property.

c. The Applicant is right in saying that termination notice dated 08.11.2019 is hit by Section 14(1)(d) of the Code. He rightly relied on the judgement of Hon'ble Supreme Court in the case of *Rajendra K. Bhutta (supra)* which is an authoritative pronouncement on the

applicability of Section 14(1)(d). It is beneficial to extract the following paragraphs of the judgement for better understanding of this proposition:

"1. This appeal raises a question as to the correct interpretation of Section 14(1)(d) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"). The facts necessary to appreciate the setting in which this question arises are as follows:

i……..
ii……
iii……..
iv…….
v……
vi….
vii. On 12.01.2018 - after the imposition of the moratorium period Under Section 14 of the Code - MHADA issued a termination notice to the Corporate Debtor stating that upon expiry of 30 days from the date of receipt of the notice, the Joint Development Agreement as modified would stand terminated. It was further stated that the Corporate Debtor would have to hand over possession to MHADA, which would then enter upon the plot and take possession of the land including all structures thereon.
viii. One hundred and eighty days from the start of the Corporate Insolvency Resolution Process (hereinafter referred to as "the CIRP") expired on19.01.2018. The NCLT, by order dated 24.01.2018, extended the CIRP period by ninety days, as is permissible under the Code.
ix. On 01.02.2018, the Appellant filed M.A. No. 96 of 2018, seeking a direction from the NCLT to restrain MHADA from taking over possession of the land till completion of the CIRP, contending that such a recovery of possession was in derogation of the moratorium imposed Under Section 14 of the Code. The NCLT, by order dated 02.04.2018, dismissed the aforesaid application, stating that Section 14(1)(d) of the

Code does not cover licenses to enter upon land in pursuance of Joint Development Agreements, stating that such licenses would only be 'personal' and not interests created in property. An appeal against this order was preferred to the NCLAT.

x. Meanwhile, in a parallel proceeding, on 18.04.2018, the amount of time taken by the NCLT in deciding the application Under Section 7 under the Code, being 55 days, was sought to be omitted from the total number of days allowable under the Code. This application was partially granted, excluding 38out of 55 days. An appeal to the NCLAT proved successful, whereby the NCLAT, by order dated 09.05.2018, allowed the appeal and allowed the entire55 days so taken before the NCLT to be excluded.

xi. On 03.07.2018, the Appellant filed an approved Resolution Plan before the NCLT, Mumbai by way of I.A. No. 21433 of 2018. We are informed that this was within the extended period of 55 days so granted by the NCLAT. It may only be mentioned that the Resolution Plan was approved by 86.16% of the Committee of Creditors. Ultimately, the NCLAT, by the impugned order dated 14.12.2018, (after omitting to refer to the order dated 09.05.2018), stated that 270 days are over, as a result of which the entire discussion of Section14(1)(d) would now become academic. However, it also decided:

> *14. On perusal of record, we find that pursuant to the 'Joint Development Agreement' the land of the 'Maharashtra Housing and Area Development Authority' was handed over to the 'Corporate Debtor' and 'except for development work' the 'Corporate Debtor' has not accrued any right over the land in question. The land belongs to the 'Maharashtra Housing and Area Development Authority' which has not formally transferred it in favour of the 'Corporate Debtor'. Hence, it cannot be treated to be the asset of the 'Corporate Debtor' for application of provisions of Section 14(1)(d) of the 'I & B Code'."*

"7. A bare reading of Section 14(1)(d) of the Code would make it clear that it does not deal with any of the assets or legal right or beneficial interest in such assets of the corporate debtor. For this reason, any reference to Sections 18 and 36, as was made by the NCLT, becomes wholly unnecessary in deciding the scope of Section 14(1)(d), which stands on a separate footing. Under Section 14(1)(d) what is referred to is the "recovery of any property". The 'property' in this case consists of land, ad-measuring47 acres, together with structures thereon that had to be demolished. 'Recovery' would necessarily go with what was parted by the corporate debtor, and for this one has to go to the next expression contained in the said Sub-section."

"11. Regard being had to the aforesaid authorities, it is clear that when recovery of property is to be made by an owner Under Section 14(1)(d), such recovery would be of property that is "occupied by" a corporate debtor."

"15. The conspectus of the aforesaid judgments would show that the expression "occupied by" would mean or be synonymous with being in actual physical possession of or being actually used by, in contra-distinction to the expression "possession", which would connote possession being either constructive or actual and which, in turn, would include legally being in possession, though factually not being in physical possession. Since it is clear that the Joint Development Agreement read with the Deed of Modification has granted a license to the developer (Corporate Debtor) to enter upon the property, with a view to do all the things that are mentioned in it, there can be no gain saying that after such entry, the property would be "occupied by" the developer. Indeed, this becomes clear from the termination notice dated 12.01.2018, issued by MHADA to the developer, in which it is stated:

> ***35.*** *This is therefore to inform you that on the expiry of 30 days from the date of receipt of this notice, the Joint Development Agreement dated 10.04.2008and Deed of Confirmation and*

> *Modification dated 03.11.2011 and Letter dated18.01.2014 stands terminated and you will not be allowed to enter the property and your authority/license to enter the property or remain there upon is terminated."*

"16. There is no doubt whatsoever that important functions relating to repairs and reconstruction of dilapidated buildings are given to MHADA. Equally, there is no doubt that in a given set of circumstances, the Board may, on such terms and conditions as may be agreed upon, and with the previous approval of the Authority, handover execution of any housing scheme under its own supervision. However, when it comes to any clash between the MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced Under Section 14 the moment a petition is admitted Under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has thus been made is, unlike its predecessor in the SICA, 1985 only a limited one, which is expressly limited by Section 31(3) of the Code, to the date of admission of an insolvency petition up to the date that the Adjudicating Authority either allows are solution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to Under Section14 must be strictly observed so that the corporate debtor may finally be put back on its feet albeit with a new management."

"17. My learned brother S. Ravindra Bhat, J.'s judgment in Municipal Corporation of Greater Mumbai (supra), which has been strongly relied upon by Mr. Dave and Mr. Patil, dealt with an entirely different fact situation, as is clear from paragraphs 32 and 33 of the said judgment, which are set out herein below:

> ***32.*** *A cumulative reading of the stipulations reveals that the contract/agreement contemplates that the lease deed was to be executed after the completion of the project. The contract reveals that (a) the project period was for 60 months starting from the date excluding the monsoon period; (b)by Clauses 5 and 17, Seven Hills could mortgage the property for securing advances from financial institutions for the construction of the project and thereafter towards its working. Such mortgage/charge or interest was subject to approval by MCGM. In the event the contract was to be terminated, it was agreed that MCGM would not in any manner be liable towards the mortgaged amount and all its rights and ownership would continue to vest in it free from encumbrances (Clause 17).*
>
> ***33.*** *The show cause notice in this case preceded admission of the insolvency resolution process. In view of the clear conditions stipulated in the contract, MCGM reserved all its rights and its properties could not have therefore, in any manner, been affected by the resolution plan. Equally in the opinion of this Court, the adjudicating authority could not have approved the plan which implicates the assets of MCGM especially when SevenHills had not fulfilled its obligations under the contract.*

"18. The matter had come to this Court after the Adjudicating Authority had approved of a certain resolution plan, unlike in the facts of the present case, and what was clear, on the facts of that case, was that a show cause notice of the Municipal Corporation, which preceded admission of the insolvency resolution process, made it clear that assets of MCGM could not possibly be subsumed within a resolution plan without its approval/permission. It was in this context that this Court, in para 47 of the said judgment, stated that Section 238 of the Code cannot be read as overriding the MCGM's right-indeed its public duty-to control and regulate how its properties are to be dealt with. "Properties" was referred to in this judgment as referring to assets of the corporate debtor. We have

> *seen how, in the facts of this case, we are not concerned with the assets of the corporate debtor, least of all the assets of MHADA. The limited question before us is as to whether Section 14(1)(d) of the Code will apply to statutorily freeze 'occupation' that may have been handed over under a Joint Development Agreement.*
>
> *"19. ……. As we have pointed out herein above, it is clear that Section 14(1)(d) of the Insolvency & Bankruptcy Code, when it speaks about recovery of property "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property. For this reason also, this judgment is wholly distinguishable."*
>
> *"20. Regard being had to the above, we allow the appeal and set aside the impugned order of the NCLAT. Considering that this matter has been pending for some time, we direct the NCLT to dispose of the resolution professional's application (I.A. No.21433/2018) within a period of six weeks from today."*

9. From the above, it is clear that R1's action in seeking possession of the leased land, during the currency of CIRP, is hit by Section 14(1)(d) of the Code.

10. R1's reliance on the judgement of the Hon'ble Supreme Court in the case of *Municipal Corporation of Greater Mumbai* v. *Abhilash Lal & Ors.*, (*supra*) at this stage, may not be helpful. Further, the reliance on the judgements in *Embassy Property Developments Pvt. Ltd. (supra) and Monnet Ispat & Energy Ltd. (supra),* at this stage is misplaced.

11. The judgement of the Hon'ble Supreme Court in *Rajendra Bhutta*'s case (*supra*) is the comprehensive answer to all the contentions raised by R1.

12. The dismissal of the Writ Petition filed by R2 on the file of the Hon'ble Bombay High Court cited supra does not have any bearing on these proceedings.

13. In view of the above discussions the Application is accordingly allowed. Prayer (a) is allowed. As far as prayer (b) to (d) are concerned, R1 shall not take any coercive steps till the Application for approval of the Resolution Plan (MA No. 3960 of 2019) is heard by this Bench. List MA No. 3960 of 2019 forthwith for hearing.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Janab Mohammed Ajmal
Member (Judical)